

C. B. SLABAUGH

IBLA 89-451

Decided September 5, 1990

Appeal from a decision of the Montrose District Office, Bureau of Land Management, rejecting application for a right-of-way for a water diversion and water pipeline. COC 48565.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

A Bureau of Land Management decision rejecting a right-of-way application for a water diversion and water pipeline in a wilderness study area, filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

APPEARANCES: C. B. Slabaugh, Lake City, Colorado, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

C. B. Slabaugh has appealed from a May 4, 1989, decision of the Montrose District Office, Bureau of Land Management (BLM), rejecting his right-of-way application, COC 48565, for a water diversion and water pipeline to be located on public land in sec. 22, T. 43. N., R. 4 W., New Mexico Principal Meridian, Hinsdale County, Colorado.

Slabaugh filed his application in August 1988 seeking authorization to construct a water diversion in Patterson Spring and convey the water through a surface-laid plastic pipe to property commonly known as the Morningside Lode (M. S. 18509) (also platted as the Alpine Heights Subdivision) on Lake San Cristobal. In the application, he represented that the water was needed for "the Morningside Lode M. S. 18509," and that the "[p]ublic benefit would be improved vegetation of aesthetic value." He further stated therein that

the "project may lead to increased population with attendant improvement of economic and social aspects of Morningside Lode." Slabaugh held a conditional water right for usage of 0.2 cfs of water from Patterson Spring, granted by the State of Colorado.

BLM prepared an environmental assessment (EA) and a Land Report in conjunction with the case. Therein, BLM found that while the physical impacts of construction of the right-of-way would be minimal, the major resource that would be affected by Slabaugh's proposal would be wilderness. The water diversion and approximately 1,300 feet of pipe would be located within the boundaries of the Redcloud Peak Wilderness Study Area (WSA), while an additional 1,000 feet of pipeline would be located outside the WSA boundaries.

BLM recommended in the Land Report that the application be rejected, based on the following rationale:

The physical disturbance associated with constructing a small diversion and pipeline as described in the proposed action would be deemed non-impairing to wilderness values because all the improvements could easily be removed from the WSA. [1/] The diversion and pipeline would however allow the applicant to put the water that has been conditionally decreed to beneficial use which would result in an absolute decree for the water. An absolute decree may ultimately hinder our ability to require the applicant to remove his improvements no matter what he may agree to in a R/W grant. In this sense the application should be viewed as being potentially impairing to wilderness values and should therefore be denied.

(Land Report at 2).

BLM utilized that rationale in its decision to reject Slabaugh's application, concluding that "[a]pproval of your R/W application would conflict with the Bureau of Land Management's [sic] legal mandate to preserve wilderness designations prerogatives to Congress."

In his appeal, Slabaugh asserts that the EA specifically found that his proposed right-of-way would be nonimpairing to wilderness values. Whether he has the right to 0.2 cfs from the spring or whether that right reverts to the State of Colorado, he contends, "would have no bearing on

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<sup>1/</sup> BLM's Interim Management Policy and Guidelines for Lands Under Wilderness Review, H-8550-1, sets forth nonimpairment criteria at Chapter I, B. 2., for determining whether an activity will be considered nonimpairing. The first criteria, at paragraph (a), is that the activity is temporary, which "means that the activity may continue until the time when it must be terminated in order to meet the reclamation requirements of paragraphs (b) and (c) below." Under the reclamation requirements, all improvements would need to be removed by Oct. 21, 1991.

'wilderness designations prerogatives.'" He also argues that granting the right-of-way would be in the public interest, because the water, although to be used on the Morningside Lode, would be available for fire protection for public land adjacent to, but accessible only through, the Morningside Lode.

[1] The Secretary of the Interior or his duly authorized representative has the discretion to accept or reject a right-of-way application for a water diversion project filed under section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §1761 (1982). Eugene V. Vogel, 52 IBLA 280, 283, 88 I.D. 258, 259 (1981); see Stanley S. Leach, 35 IBLA 53, 55 (1978). A BLM decision rejecting such a right-of-way will ordinarily be affirmed by the Board when the record shows that the decision represents a reasoned analysis of the factors involved with due regard for the public interest. Eugene V. Vogel, *supra*; see Pete Zanetti, 113 IBLA 239, 241 (1990).

Contrary to Slabaugh's contention that BLM found his proposed right-of-way to be nonimpairing, what BLM actually stated in the EA was that the project "could be constructed so as not to physically impair the areas [sic] suitability as wilderness. However, in order to meet the non-impairment standard the use would have to be temporary and would have to be removed by October 21, 1991" (EA at 3). Therefore, only a temporary grant requiring improvements to be removed by October 21, 1991, might be considered nonimpairing.

The record is clear that, while construction of the proposed right-of-way would have minimal immediate physical impact on the WSA, BLM's concern is with the effect of the establishment of a vested water right within the WSA and the possible management problems that could pose for BLM. We cannot say that such a concern is unreasonable.

Although Slabaugh asserts that granting the right-of-way would have the added benefit of providing water for fire protection for public land "adjacent to the Morningside Lode" and accessible by land only through the Morningside Lode, the record contains a map entitled "Spring Location Map," prepared by a registered Colorado surveyor, dated May 29, 1985, depicting the Morningside Lode as occupying an entire peninsula in Lake San Cristobal. That map and others accompanying the EA and Land Report do not indicate that there is any public land for which land access is obtainable only through the Morningside Lode. Moreover, even if Slabaugh's assertion is true, that fact does not negate BLM's concern regarding its management responsibilities for the WSA vis a vis the establishment of a vested water right.

In addition, Slabaugh's application indicated that the water from the spring would be utilized for enhancing the vegetation on the Morningside Lode. Given the peninsular location of the Morningside Lode, Slabaugh may be able to utilize water from Lake San Cristobal for such a purpose. As indicated by BLM in its decision, rejection of the application does not prejudice Slabaugh's right to file a new right-of-way application following final resolution of the wilderness status of the Redcloud Peak WSA.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Administrative Judge      Bruce R. Harris

I concur:

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David L. Hughes  
Administrative Judge